N-TATT CONSTRUCTION SDN BHD

v.

JAYARENA CONSTRUCTION SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
VINCENT NG J
[ORIGINATING SUMMONS NO: D1-24-115-2003]
2 APRIL 2004

COMPANY LAW: *Winding up - Petition - Injunction to restrain presentation of petition, application for - Debts, whether there is bona fide dispute - Whether there should be a trial - Justice of the case - Winding-up jurisdiction and disputed debts - Abuse of process of court - Companies Act 1965, s. 218(1)(e), (2)(c)*

This was an application by the plaintiff for an injunction to restrain the defendant from presenting a winding-up petition against the plaintiff based upon a disputed debt. The defendant had earlier served the plaintiff with a notice under s. 218(1)(e) of the Companies Act 1965 ('the Act') demanding the payment of RM9.18 million for piling works allegedly done.

Held (allowing the application):

[1] The provisions of s. 218(1)(e) of the Act (read together with s. 218(2)(c) thereof) would only come into the court's focus after the issuer of the statutory notice of demand has made out, to the satisfaction of the court, the *bona fide* nature of the alleged debt. (p 760 b)

[2] It was surprising that the defendant never made any attempts to recover the RM9.18 million sum for two and a half years after the alleged completion of the piling works. The plaintiff's reply to the defendant's letters of demand was consistent with its assertion that there was a *bona fide* dispute as to the alleged debt. The defendant's failure to produce documents to support its contention that it had completed the piling works also lent credence to the plaintiff's allegation that the defendant had relied on fictitious documentation. There was, therefore, a *bona fide* dispute as to the debt, and this would best be resolved by way of a trial. (pp 760 f-h & 761 a-b)

[3] Considering the tremendous hardship, the significant commercial embarrassment and the economic prejudice that a winding-up petition entails, the justice of the case here would favour the plaintiff. It would be unjust to refuse its application for an injunction. The winding-up jurisdiction

is not for deciding a disputed debt (that is disputed on substantial and not unsubstantial grounds). It would otherwise be an abuse of the process of the court. (p 761 c-g)

[Injunction granted.]

Case(s) referred to:

Allen & Ors v. Jumbo Holdings Ltd [1980] 2 All ER 502 ***(refd)***

Cheng Hang Guan & Ors v. Perumahan Farlim (Penang) Sdn Bhd & Ors [1988] 3 MLJ 90 ***(refd)***

Dato' Tan Toh Hua & Ors v. Tan Toh Hong & Ors [2001] 1 CLJ 733 CA ***(refd)***

Keet Gerald Francis Noel John v. Mohd Noor Abdullah & Ors [1995] 1 CLJ 293 CA ***(refd)***

Malayan Flour Mill Bhd v. Raja Lope and Tan Co [2000] 7 CLJ 288 HC ***(refd)***

Malaysian Resources Corporation Bhd v. Juranas Sdn Bhd [2002] 7 CLJ 260 HC ***(foll)***

Mann v. Goldstein [1968] 2 All ER 769 ***(foll)***

Pengkalen Securities Sdn Bhd v. Leow Li Lian [1997] 5 CLJ 440 HC ***(refd)***

Legislation referred to:

Companies Act 1965, s. 218(1)(e)

For the plaintiff - D Bhaskaran; M/s Shearn Delamore & Co
For the defendant - CL Chin; M/s CL Chin & Assocs

Reported by Gan Peng Chiang

JUDGMENT

Vincent Ng J:

Preamble

The plaintiff *vide* encl. 1 is seeking an injunction to restrain the defendant from presenting a winding up petition based on a disputed debt. The defendant served the plaintiff a notice under s. 218(1)(e) of the Companies Act (the Act) 1965 dated 9 May 2003 (exh. CTS 13 encl. 2), demanding payment of RM9.18 million for works done. No issue was taken by the defendant on the nature and manner encl. 1 was pleaded.

Background Facts

In order to ensure the proper and fair determination of this matter, it is necessary to review the surrounding facts that culminated in this matter being brought before this court.

The plaintiff was appointed as a turnkey contractor by Solarglow in a two-phase project for the construction of a business centre (exhs. CTS 1 & 2 encl. 2) dated 2 April 1999 and 10 April 2000 respectively. The plaintiff, in turn, appointed Sanctuary Court Sdn Bhd (Sanctuary) as the sub-contractor to do the piling works in phase 1 of the project on 14 September 1999 (exh. CTS 3 encl. 2). Sanctuary completed the piling works by end of Oct 1999 (exh. CTS 4 encl. 2).

The plaintiff alleged that one SP Tan, the General Manager of YCS Corporation, which owns Solarglow, persuaded Chan Tian Siong (Chan), plaintiff's then project manager, to sign the following documents:

(i) a letter dated 17 July 2000, appointing the defendant as sub-contractor to do piling work in 2nd phase of contract (exhs. CTS 5 encl. 2);

(ii) 3 certificates of payment dated 16 October, 15 November and 18 December 2000 respectively, that the works were completed and that payment was due (exhs. CTS 6 – 8 encl. 2); and

(iii) a letter dated 7 December 2000, certifying the practical completion of the works (exh. CTS 9 encl. 2).

The plaintiff alleged that Chan felt obliged to sign the fictitious documents, even though the 2nd phase of project did not involve any piling works. He did so on the understanding that those documents would not be used to claim any monies from the plaintiff.

The defendant emphatically denied all the plaintiff's allegations and maintained that exhs. CTS 5-9 encl. 2 were valid documents as the defendant did actually carry out the piling works. The defendant denied any links with SP Tan, Yap Kwee Huat, YCS Corporation, Solarglow or Sanctuary Court.

The Law

The relevant provisions of the Act 1965 are reproduced below for ease of reference.

Section 218(1) reads that:

> The Court may order the winding up if:
>
> (e) the company is unable to pay its debts;
>
> …

whilst sub-section (2) provides that:

> A company shall be deemed to be unable to pay its debts if:
>
> …
>
> (c) **it is proved to the satisfaction of the Court that the company is unable to pay its debts**; … (emphasis added).

As I had occasion earlier, in *Malaysian Resources Corporation Bhd v. Juranas Sdn Bhd* [2002] 7 CLJ 260, to express my views on the above provisions, I would reiterate that s. 218(1)(e) read together with (2)(c) would only come into the court's focus after the issuer of the statutory notice of demand has made out, to the satisfaction of the court, the *bona fide* nature of the alleged debt.

In considering any application for injunction, it is well settled law that the presiding judge should consider:

(i) whether looking at the totality of the facts, they disclose a *bona fide* serious issue to be tried;

(ii) where the justice of the case lies; and

(iii) whether the discretionary relief sought, if granted would produce a just result and maintain the *status quo*.

(See *Keet Gerald Francis Noel John v. Mohd Noor bin Abdullah & Ors* [1995] 1 CLJ 293, *Pengkalen Securities Sdn Bhd v. Leow Li Lian* [1997] 5 CLJ 440 and *Malayan Flour Mill Bhd v. Raja Lope and Tan Co* [2000] 7 CLJ 288.)

The Merits Of The Application

I find surprising that for nearly 2 1/2 years after the alleged completion of the piling works, the defendant never made any attempt to recover the payment of RM9.18 million due to them. Then, out of the blue they issued two letters of demand dated 10 April 2003 and 30 April 2003 respectively (exhs. CTS 10-11 encl. 2).

Consistent with their stance that there was a *bona fide* dispute, the plaintiff issued a letter dated 8 May 2003 (exh. CTS 12 encl. 2) in response to the defendant's second letter of demand, wherein the plaintiff disputed that there was a debt owed and requested the defendant to adduce other documents to evidence the fact that the defendant did actually carry out the piling works. The defendant did not answer this letter but instead, almost immediately caused their solicitor to issue a s. 218(1)(e) notice.

The defendant's failure to produce other documents, to support their contention that they did indeed carry out the works, lends some credence to the plaintiff's allegation that the documents relied on by the defendant are fictitious. This raises a *bona fide* dispute as to the debt, that can best be resolved by way of a trial.

Even without considering the merits of the plaintiff's allegation, I recognise that the surrounding factual matrix of this case raises questions about the relationship between the defendant and the various companies identified by the plaintiff and the crucial roles played by SP Tan and Chan in relation to the documents. The defendant would do better to have these questions and the issue of the plaintiff's liability determined during the course of a full trial.

Bearing in mind the tremendous hardship, significant commercial embarrassment and economic prejudice a winding up petition entails, I find that the justice of the case favours the plaintiff and, to refuse the application would produce an unjust result. The prejudice the defendant would have to endure if the plaintiff's application is granted is considerably less than the harsh realities that would befall the plaintiff should the same application be disallowed. The injunction if granted would not preclude the defendant from suing the plaintiff to recover the debt. This avenue, though longer, is still open to the plaintiff.

Until such time, the injunction would serve to maintain the status quo of the plaintiff. Upon receipt of the second letter of demand, the plaintiff acted with alacrity to dispute the defendant's claim and to request for verification of the claim. The defendant's choice in issuing the statutory notice of demand as the response to the plaintiff's inquiry seems to me to be an abuse of the Court process. I am guided by the judgment of Ungoed-Thomas J in *Mann v. Goldstein* [1968] 2 All ER 769 at 775, wherein he held that:

> For my part, I would prefer to rest the jurisdiction directly on the comparatively simple propositions that a creditor's petition can only be presented by a creditor, that **the winding up jurisdiction is not for deciding a disputed debt (that is disputed on substantial and not unsubstantial grounds)** since, until a creditor is established as a creditor he is not entitled to present the petition and has no locus standi in the companies court; and that, therefore, to invoke the winding up jurisdiction when the debt is disputed (that is, on substantial grounds) or after it has become clear that it is so disputed is an abuse of the process of the court. (emphasis added).

Lastly on the contention by the defendant that the plaintiff's undertaking is inadequate, I hold the same view as expressed by Edgar Joseph Jr J (as he then was) in *Cheng Hang Guan & Ors v. Perumahan Farlim (Penang) Sdn Bhd & Ors* [1988] 3 MLJ 90:

> In any event, the court will not generally deny a plaintiff an interlocutory injunction to which he would otherwise be entitled simply on the ground that his cross undertaking in damages would be limited or of no value. … The rationale behind this was that the questions of financial ability ought not to affect the position in regard to what is the essential justice of the case.

(See *Allen & Ors v. Jumbo Holdings Ltd* [1980] 2 All ER 502, *Pengkalen Securities Sdn Bhd v. Leow Li Lian (supra)* and *Dato' Tan Toh Hua & Ors v. Tan Toh Hong & Ors* [2001] 1 CLJ 733.)

Conclusion

After careful perusal of the application, the affidavits and the submissions by both parties, I decided to allow the plaintiff's application in encl. 1 with costs.